

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Cohen & Kramer M.D. P.C.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-19-1149-1143
Applicant's File No.	CruzLei
Insurer's Claim File No.	0570780350101025
NAIC No.	35882

ARBITRATION AWARD

I, Teresa Girolamo, Esq., the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: L.C.

1. Hearing(s) held on 03/03/2021
Declared closed by the arbitrator on 03/03/2021

Michael Tomforde, Esq. from Dash Law Firm, P.C. participated in person for the Applicant

Lauren Gallo, Esq. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,000.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the time of the Arbitration Applicant reduced the amount in dispute to \$1,134.04.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Whether a bill in the amended amount of \$1,134.04 for PRP to the left ankle performed on 5/2/19, as a result of an accident which occurred on 7/20/18 should

have been paid. Same was denied by Respondent based upon a peer report by Julio Westerband, M.D. In the instant case the question is whether the EMG/ NCVs were necessary and reasonable medical expenses.

Assuming arguendo that the services were medically necessary Respondent contends that the proper fee schedule should be \$881.19.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing. Both Applicant and Respondent each submitted evidence in support of their contentions. This decision is based on my review of that file, as well as the arguments of the parties at the hearing. The parties appeared via ZOOM.

With respect to the question of medical necessity, Respondent has the burden to rebut the claim with proof that the health care services were not medically necessary or with some other viable defense (See *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3rd 128[A] 2003).

Lack of medical necessity is an affirmative defense that is the Respondent's burden to prove. See, *Alliance Medical Office, P.C. v. Allstate*, 196 Misc.2d 268, 269, 764 N.Y.S.2d 341, 342 (Civil Ct., Kings Cty. 2003); *Choicenet Chiropractic^{PC} v. Allstate*, 2003 WL 1904296, 2003 N.Y. Slip Op. 50672U (App.Term 2 Dept. 2003). "At a minimum, [Respondent] must establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. *Nir v. Allstate*, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005).

Once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, "plaintiff must rebut it or succumb", *Bedford Park Medical Practice P.C. v. American Transit Ins. Co.* 8 Misc. 3d 1025 (A) 806 N.Y.S. 2d 443 (Table), 2005 N.Y. Slip Op. 51282 (U) at 3, 2005, WL 193646 (Civ. Ct. Kings Co. Jack M. Battaglia, J. August 12, 2005). The burden is on the insurer to show lack of medical necessity. See, *Expo Med. Supplies, Inc. v. Clarendon Ins. Co.*, 2006 N.Y. Slip Op. 50892U, 12 Misc. 3d 1154A, 2006 N.Y. Misc. LEXIS 1169 [Civ. Ct., Kings Co., 2006]. See, also, *A.R. Med. Art., P.C. v. State Farm Mut. Auto Ins. Co.*, 2006 N.Y. Slip Op. 50260U, 11 Misc. 3d 1057A, 815 NYS2d 493, 2006 N.Y. Misc. LEXIS 348 [Civ. Ct., Kings Co., 2006]; *Citywide Social Work & Psy. Serv. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 777 NYS2d 241 [Civ. Ct. Kings Co., 2004]; *Elm Medical P.C. v. American Home Assurance Co.*, 2003 N.Y. Slip Op. 51357U, 2003 N.Y. Misc. LEXIS 1337 [Civ. Ct., Kings Co., 2003];

A treatment or service is medically necessary if it is "appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatment or services, but treatment or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient." *Fifth Avenue Pain Control Center v. Allstate*, 196 Misc. 2d 801, 807-808 (Civ. Ct. Queens Cty. 2003). Medically necessary treatment or services must be "consistent with the patient's condition, circumstances and best interest of the patient with regard to the type of treatment or services rendered, the amount of treatment or services rendered, and the duration of the treatment or services rendered." *Id.*

Medical services are compensable where they serve a valid medical purpose. *Sunrise Medical Imaging PC v. Lumbermans Mutual* 2001 N.Y. Slip Op. 4009.

"A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards." *Id.* Similarly, "[a] peer review report's factual basis may be insufficient if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim." *Id.*, citing, *Amazon Medical Supply v. Allstate*, 3 Misc.3d 43, 779 N.Y.S.2d 715 (App Term 2d and 11 Jud Dists 2004).

In order for Respondent to meet its burden of establishing the lack of medical necessity, a peer review should (1) set forth applicable accepted medical standards relevant to the services at issue; and (2) comment on whether the Applicant had followed or deviated from those standards in providing the disputed services. This does not necessarily require that the peer review quote or cite medical literature. The *Nir* decision clearly contemplates that a peer may cite "medical authority, standard, or generally accepted practice as a medical rationale for his findings". *Nir*, 7 Misc.3d at 548.

Only if Respondent can establish a *prima facie* defense does the burden of proof shift to Applicant to rebut the defense. See, *A. Khodadadi Radiology PC v. NY Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342(U). In general, Applicant's "rebuttal" need not be in the form of an affidavit or other statement specifically created in response to the peer review; Applicant may rely on the existing medical records and reports already in evidence to counter the peer's arguments.

Respondent relies upon a peer report by Julio Westerband, M.D. in support of its affirmative defense of lack of medical necessity.

In this case, according to L.C's No-Fault Application dated 8/13/18 she was the driver of a vehicle involved in a two-vehicle accident when another vehicle reportedly ran a red light and struck her vehicle. L.C. lists injuries to his neck, mid

and lower back. In addition to right shoulder, right wrist/hand, hips, knees, ankle and foot. L.C. lists hospital treatment with Nassau University with a date of admission as an out-patient of 7/20/18 which is the date of loss.

Applicant offers a report by Cohen & Kramer, M.D. dated 10/31/18 which documents a prior left knee arthroscopy in 2014. L.C. complained of neck, lower back, left shoulder and left knee pain. L.C. also advised that the pain is aggravated in the left ankle and left hip. She gave the left knee pain a 7/10 and the left shoulder a 6/10. It was following this examination that cortisone injections were discussed and were declined. PRP injections to the left shoulder was recommended as Jeffrey Cohen, M.D. opined that "all other treatment options were exhausted." This report states that L.C. was "*amenable to the schedule in February.*". With respect to the left knee, arthroscopic surgery was scheduled for 11/26/18.

There is an 11/28/18 report from Cohen & Kramer, M.D., which states that L.C.'s has had persistent pain in the left knee which has failed all conservative treatment and that she remains "*symptomatic in the left ankle with an MRI now performed. The left knee is scheduled for arthroscopic surgery on December 10th.*" According to the treatment plan following this examination, the arthroscopic meniscectomy would be performed on December 10th. It also states that the PRP injection to the left ankle would be performed on the same date.

On 12/10/18 the left knee arthroscopy and the left ankle PRP injection were performed. These were performed by Mark Kramer, M.D. of Cohen & Kramer.

Applicant's submissions contains a post-operative checkup dated 12/19/18. The next report in Applicant's submissions is dated 4/17/19 which is a follow up for the left knee surgery and states that L.C. remains symptomatic in the left ankle. It also states "*he had multiple injuries to the left ankle which has failed to respond to all conservative treatments to date.*" The treatment plan states that PRP plasma injection to the left ankle would be performed as "*all the treatment options are exhausted. She is amenable and so is scheduled.*"

On 5/2/19 L.C. presented for a PRP injection into the left ankle joint. The physical examination of the left ankle documented pain, swelling and crepitus. "*Tender in medial and lateral compartment. Range of motion is restricted. Dorsiflexion is normal. Plantar flexion is on 30 degrees. Strength is 4/5, impaired gait.*"

Applicant submitted the appropriate health claim form to Respondent for reimbursement. Respondent submitted same along with the available medical records to Julio Westerband, M.D. for an opinion as to whether or not the PRP injections and supplies were medically necessary.

On 7/1/19, Julio Westerband, M.D., following a review of the available medical records and referencing medical authority was of the opinion that the PRP injections and supplies were not medically necessary. With respect to the left ankle, Julio Westerband, M.D. states that the PRP was not medically necessary as this was "*a one-year-old ankle sprain with MRI findings that confirm the diagnosis.*" Julio

Westerband, M.D. referencing a 2012 article states "*the current literature is complicated by a lack of standardization of study protocols, platelet-separation techniques and outcome measures. As a result, there is uncertainty about the evidence to support the increased clinical use of platelet-rich plasma ... for orthopedic bone and soft tissue injuries.*"

Julio Westerband, M.D. states "research studies are currently being conducted to evaluate the effectiveness of PRP treatment. At this time, the results of these studies are inconclusive because the effectiveness of PRP therapy can vary.". Julio Westerband, M.D. next references an article that found that PRP was not effective for improving outcomes from arthroscopic rotator cuff repairs, for which Applicant pointed out is not the case herein.

Therefore Julio Westerband, M.D. opined that the injections of 5/2/19 and the unlisted supplies should be denied. It was based upon this report that Respondent issued a Denial of Benefits.

In this case Applicant offers a Rebuttal by Jeffrey Cohen, M.D. which addresses the question of medical necessity for the PRP injection to the left ankle performed on 5/2/19. Jeffrey Cohen, M.D. discusses that the MRI of the left ankle performed on 11/9/18 revealed "*partial-thickness tears of the posterior talofibular as well as anterior inferior tibiofibular ligaments associated with irregularity, heterogeneity and adjacent fluid.*"

Interestingly, Jeffrey Cohen, M.D. mentions the 11/28/18 evaluation but skips over the operative report of 12/10/18 which states that at that time there was a left ankle PRP performed. The next medical report that Jeffrey Cohen, M.D. addresses is the 4/17/19 report. It states that following this evaluation that L.C. agreed to the left ankle PRP.

There is clearly evidence that in fact two separate PRP injections were performed to the left ankle with the first on 12/10/18 by Mark Kramer, M.D. The issue as to whether or not this would have an impact on the medical necessity of the 5/2/19 PRP injection. It is almost like one doctor did not know that the other doctor of the practice already performed the PRP injection some 7 months earlier. I find that this should have been addressed in the Rebuttal which makes me question the credibility of Applicant's evidence. However, the burden of proof is on Respondent to establish lack of medical necessity. In reviewing the list of medical records provided to Julio Westerband, M.D., it is evident that the operative report of 12/10/18 was not provided for consideration. Had it been provided the peer reviewer would have been able to comment on whether or not the second PRP injection of 5/2/19 was medically necessary with respect to one already having been done on 12/10/18. It was incumbent on the claims department to provide all necessary documentation to the peer reviewer. This omission of the medical report, is in this Arbitrator's opinion, a critical piece of medical evidence that should have been presented. As such, with the burden on Respondent, I find that the peer report, as written is legally insufficient to establish its affirmative defense of lack of medical necessity as only a partial analysis was presented. Could the opinion be different? No one can know as

the peer reviewer was not provided this report. I can not speculate on the "what ifs" only that I am presented with an incomplete picture. As such, the next issue is one of fee schedule.

Once the insurer makes a *prima facie* showing that the amounts charged by a provider were in excess of the fee schedule, the burden shifts to the provider to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. *Cornell Medical, P.C. v. Mercury Casualty Co.*, 24 Misc.3d 58, 884 N.Y.S.2d 558 (App. Term 2d, 11th & 13th Dists. 2009).

The original charge for the PRP injection performed on 5/2/19 was billed in the amount of \$2,500.00 under CPT Code 20999 and the unlisted supplies were billed in the amount of \$500.00 under CPT code 99070. The third charge was an office visit billed under CPT Code 99214 25 in the amount of \$85.53.

Applicant amended the amount in dispute to \$1,134.04.

Respondent offers a Coder Affidavit of Carolyn Mallory, CPC. With Signet Claims Solutions, LLC. Ms. Mallory, states that she is a certified coder with AAPC and has been a coder for over 20 years.

Starting on page 1, Ms. Mallory offers a chart and lists the three charges; the office visit under CPT Code 99214-25 billed in the amount of \$85.53 for which she states the correct reimbursement is "\$0.00" and to see the summary. This was actually paid and is noted on the NF-10. Therefore the only issue are the next two charges.

She next lists at line 2, the PRP injection under CPT code 20999 billed in the amount of \$2,500.00 with a proper amount of \$665.37. Line three is for the unlisted supplies, under CPT code 99070 billed in the amount of \$500.00 for which she finds the proper amount should be \$215.82, This would bring the total amount allowed of \$881.19.

With respect to the office visit under CPT code 99214-25, Ms. Mallory relies on Ground Rule #2 in Surgery Section of the fee schedule that this is not supported nor is modifier 25. Ms. Malloy next provides an analysis for each of the two remaining codes which comes to a total of \$881.19. With respect to code 20999 this is a By Report code. Ms. Mallory inserted in the affidavit language from the 5/2/19 medical report regarding the PRP injection. Ms. Mallory therefore states that the relative value is 1.59 and attached the definitions for CPT codes 36511; 36512; 36513; and 36514. Following Ground rule #3, she used for isolating the platelets $1.59 \times 210.71 = \$335.03$; for aspiration of bone marrow, she used the RVU for CPT code 38220 Bone Marrow aspiration only $59 \times 210.71 = \$124.32$ then reduced by 50% per ground rule #5 = \$62.16; for injections of platelets, she used the RVU of code 20610 of $25 \times 210.71 = \$52.68$ then reduced by 50% based on ground rule 5; and finally, ultrasound guidance using the RVU of CPT 76942 $4.97 \times 48.66 = \$241.84$. This is how the amount of \$665.37 was calculated. The Coder Affidavit was signed on 5/31/2020 and uploaded on 6/1/2020.

On 2/17/2021, Applicant uploaded a Coder Affidavit of Eddie Hearn, CPC. Mr. Hearn is also accredited with the AAPC but does not specify for how long he has been a professional coder.

At paragraph 5, Eddie Hearn notes that the PRP injection is a By Report code and discusses that the PRP kit supplies should be \$215.82. At paragraph 6 Mr. Hearn states that the following CPT codes involve procedures similar to each step involved in the PRP injections; CPT codes 50390; 36513; 20605; and 76942. As such, Mr. Hearn opines that the reasonable RV would be the sum of the RV units of these procedures; he provides the RV for each and a calculation to come to the total of \$918.22 plus the \$215.82 for the supplies totally \$1,134.04.

Each coder agrees on the \$215.82 as such the only code at issue is for the injections.

Having reviewed the evidence in its entirety, I find that I am persuaded by Respondent's fee coder affidavit. As such, Applicant is awarded the sum of \$881.19.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. I find as follows with regard to the policy issues before me:

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	Cohen & Kramer M.D. P.C.	05/02/19 - 05/02/19	\$3,000.00	\$1,134.04	Awarded: \$881.19
Total			\$3,000.00		Awarded: \$881.19

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/22/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is due from 11/22/19 to date of payment.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

Respondent is directed to pay attorney fees in accordance with No-Fault regulations.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Nassau

I, Teresa Girolamo, Esq., do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

03/03/2021
(Dated)

Teresa Girolamo, Esq.

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form

Unique Modria Document ID:

e6c43b297338c16a838fca7c872f18fa

Electronically Signed

Your name: Teresa Girolamo, Esq.
Signed on: 03/03/2021